No. 91-1523

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,
v.
SHANNON CARTER, by and through her father and next friend, EMORY CARTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a learning disabled child's parents are entitled to public reimbursement under the Individuals with Disabilities Education Act when they unilaterally place her in a private school that does not meet state educational standards and does not provide education in conformity with an individualized education program (IEP).

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Issues concerning the provision of primary and secondary education are of the utmost fiscal and social importance to *amici*; education is the single largest expenditure of state

and local governments. *See* U.S. Advisory Commission on Intergovernmental Relations, *The Structure of State Aid to Elementary and Secondary Education* iii (1990).

The court of appeals' decision threatens the ability of state and local governments to provide children with high quality, cost-effective education by requiring reimbursement under the Individuals with Disabilities Education Act for unilateral parental placements that do not meet state educational standards. Unless corrected, the court of appeals' holding will undermine those standards and seriously impair the ability of state and local governments to make effective use of their finite resources available for education. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case.

SUMMARY OF ARGUMENT

1. A remedy granted pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* (formerly the Education of the Handicapped Act), must be " 'appropriate' in light of the purpose of the Act." *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 369 (1985) ("*Burlington*") (quoting 20 U.S.C. § 1415(e)(2)). It must, therefore, further the Act's primary purpose of "provid-[ing] handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.' " *Id.* (quoting 20 U.S.C. § 1400(c)). The reimbursement remedy upheld by the court of appeals not only fails to advance this overarching purpose of the IDEA, it undermines it. For this reason, the judgment of the court of appeals should be reversed.

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37 of the Rules of this Court.

The Act gives the term "free appropriate public education" ("FAPE") a precise meaning, one which incorporates specific substantive requirements that reflect congressional policy choices. The Carters' placement of Shannon at Trident Academy lacked two of the elements Congress viewed as critical to the educational opportunity it sought to provide disabled children: (1) that the education meet the standards of the state educational agency; and (2) that education be provided in conformity with an individualized education program (IEP). *See* 20 U.S.C. § 1401(a)(18). The absence of either one of these elements precludes reimbursement, since public reimbursement for such a placement would not advance the Act's carefully crafted, multifaceted objective. On the contrary, such reimbursement virtually guarantees that fewer children with disabilities will receive the full measure of educational opportunity that Congress envisioned for them, by creating financial incentives in favor of placements which do not embody all of the elements Congress deemed essential.

In contending that the specifics of a "free appropriate public education" are irrelevant to reimbursements for parental placements since the Act does not, by its terms, place any obligations or limitations on parents, respondents and the United States disregard the proper scope of statutory relief. Remedial relief formulated pursuant to a statute must be affirmatively grounded in congressional intent and consistent with the statutory scheme; it cannot be based merely on the statute's failure to forbid it.

Indeed, in a related context, this Court expressly recognized that Congress did not intend for the IDEA to give courts "a free hand to impose substantive standards of review which cannot be derived from the Act itself." *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). On the contrary, "the statutory authorization to grant 'such relief as the court determines is appropriate' cannot be read without reference to the obligations,

largely procedural in nature, which are imposed upon recipient States by Congress." *Id.* (quoting 20 U.S.C. § 1415(e)(2)). Yet respondents and the United States, like the court of appeals, would impose a rule which would completely divorce the conditions of reimbursement from the substance of the State's statutory obligation, leaving determinations of educational appropriateness to federal judges. This approach is inconsistent with the statutory scheme, with this Court's decision in *Burlington*, and with a long line of decisions emphasizing the limited role of federal courts in the field of education. *See, e.g., Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Respondents and the United States suggest that parents, acting unilaterally, may not literally provide a "free appropriate public education" to their children, since the statutory definition presupposes the active involvement of public school officials in supervising the child's education. This does not, however, make the terms of the FAPE irrelevant to parental reimbursement, as respondents and the United States imply; instead, it merely highlights the operation of the *Burlington* remedy.

The *Burlington* rule was prompted by a school district's failure to do the very things that the statute required of it. In such an instance, the Court held, parents may step in and take the action which the school district failed to take by providing an education that is "proper under the Act." *Burlington*, 471 U.S. at 369. Whether such a unilateral parental placement is "proper under the Act" can only be determined by reference to the specific substantive requirements placed on States by the Act. Hence, the Court's reimbursement remedy in *Burlington* was designed to enforce, retroactively, the town's obligation under the Act, by "merely requir[ing] the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Id.* at 370-71.

The *Burlington* Court did not, in short, give parents an open-ended entitlement to the education of their choice whenever the school district fails to make a proper placement. *Burlington* limits reimbursement to parents who make placements which are "proper under the Act." *Id.* at 369. A placement, such as respondents' at Trident, which lacks central elements of the educational opportunity Congress sought to provide cannot effectuate the State's obligation or the Act's fundamental purpose; hence, under *Burlington*, it cannot be "proper under the Act."

2. If allowed to stand, the decision of the court of appeals will disrupt the balance of power among federal, state and local governments with respect to the education of children with disabilities and distort the cooperative framework that Congress chose to create under the Act. The long-standing role of States in setting educational standards will be supplanted in a manner never intended by Congress. As the Court observed in *Rowley*, "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." 458 U.S. at 208.

Moreover, the usurpation of the States' historic role in setting standards would violate the principles this Court set out in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), and applied in *Rowley*, since States never agreed to relinquish control over the setting of educational standards as a condition of receiving federal funds under the IDEA. On the contrary, the Act reinforces the primacy of state educational standards by expressly incorporating them into the statutory scheme.

Finally, reimbursement for placements such as the Carters' would undermine the efforts of state and local governments in providing high-quality education and pursuing the most cost-effective uses for limited special edu-

cation dollars. Standards set by the state educational agency provide a necessary check on the quality and cost-effectiveness of the programs which state and local governments fund. The court of appeals' decision removes this crucial check, requiring state and local governments to spend money out of the public fisc on programs over which they have no control, and which are utterly unaccountable to them. This, *amici* submit, is a result intended neither by Congress in the IDEA nor by this Court in *Burlington*.

ARGUMENT

I. THE REMEDY UPHELD BY THE COURT OF APPEALS IS INCONSISTENT WITH THE STATUTORY PURPOSE DETAILED IN THE IDEA

This Court has repeatedly emphasized that a remedy cannot be imposed pursuant to a statute unless that remedy comports with congressional intent and is consistent with the statutory scheme. Acting within its discretion, a court may frame equitable remedies which are necessary "to give effect to the policy of Congress" and which effectuate the purposes of the statute. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946).[2] Hence, the starting point in determining the availability of a particular remedy is whether that remedy would further the specific purposes and policies embodied in the legislation. A remedy inconsistent with the statute's purposes is impermissible, since it does not accord with congressional intent. *A fortiori*, a remedy like that upheld by the court of appeals, which undercuts the purposes of the statute

[2] *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (in implying causes of action, "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law"); *SEC v. Sloan*, 436 U.S. 103, 116 (1978) (Court "not inclined to read [remedial provision of statute] more broadly than its language and the statutory scheme reasonably permit").

and directly contravenes the intentions Congress expressed therein, is invalid.

Even where a statute confers a very broad grant of remedial authority, remedies must nevertheless serve to "make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). The propriety of a particular remedy must therefore be determined by reference to the specific content of the statutory or constitutional provisions that have allegedly been violated. *Id.* at 684-85. Where, as here, the "wrong done" is the failure to fulfill a specific statutory obligation, that "wrong" must be corrected by effectuating that specific obligation, not by imposing different or inconsistent sets of obligations on the party who fell short of the statutory requirement.

While Congress did not itemize the types of remedial relief permissible under the IDEA, it authorized courts to grant only "appropriate" relief. 20 U.S.C. § 1415(e)(2). In *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 369 (1985), this Court concluded that "[a]bsent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act." That purpose, the Court said, is "principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" *Id.* (quoting 20 U.S.C. § 1400(c)). When assessed against this central congressional purpose, which is carefully detailed within the IDEA, the court of appeals' remedy is plainly improper.

A. The Overarching Purpose of the IDEA is to Safeguard the Right of Children With Disabilities to a "Free Appropriate Public Education"

Congress had something very specific in mind when it set out to guarantee all children with disabilities a "free

appropriate public education" ["FAPE"].[3] Rather than leaving the meaning of that term open-ended, Congress provided a statutory definition which comprises a virtual "checklist for adequacy." *Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). One central element of the carefully delineated congressional purpose is that handicapped children must be afforded an education that meets the standards of the state educational agency. 20 U.S.C. § 1401(a)(18)(B). A second central element is that education must be provided in conformity with an individualized education program (IEP). *Id.* § 1401 (a)(18)(D).

State Educational Standards. Congress left undisturbed the States' role in setting educational standards by expressly incorporating "the standards of the State educational agency" into the statutory definition of a FAPE. 20 U.S.C. § 1401(a)(18)(B); *see* 20 U.S.C. §§ 1412(6) and 1413(a)(4)(B).[4] By making compliance with state educational standards a central element of a FAPE, Congress expressed its judgment that the standards set by the States were meaningful guarantors of quality in education. These standards were deemed so important

[3] The IDEA contains the following definition:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

[4] *See, e.g., Schimmel v. Spillane*, 819 F.2d 477, 484 (4th Cir. 1987) (IDEA "expressly incorporates State educational standards"); *Antkowiak v. Ambach*, 838 F.2d 635, 640 (2d Cir.) (same), *cert. denied*, 488 U.S. 850 (1988).

that Congress required them to be met in any public school or private school placement made pursuant to the Act. *See* 20 U.S.C. § 1413(a)(4)(B).[5]

Individualized Education Program. Congress made the IEP a central component of the States' statutory obligation to provide a FAPE, and specifically defined it within the Act. *See* 20 U.S.C. §§ 1401(a)(18) and (20). As this Court noted in *Honig v. Doe*, 484 U.S. 305, 311 (1988), Congress "[e]nvision[ed] the IEP as the centerpiece of the statute's education delivery system for disabled children." In *Burlington*, the Court reiterated that the IEP is the "*modus operandi* of the Act." 471 U.S. at 368.

The IEP is the vehicle through which a number of statutory objectives are fulfilled. One of the major features of an IEP is the individualized formulation of "annual goals, including short-term instructional objectives" for each disabled child, to be reevaluated on at least an annual basis. 20 U.S.C. § 1401(a)(20). This feature is, of course, designed to facilitate academic progress. Significantly, however, the statutory definition of an IEP also evidences other congressional purposes.

One such additional purpose is providing a vehicle through which parental involvement is assured. The statutory definition of the IEP specifically contemplates a close working relationship between parents and educators in formulating an individualized education program fitted to the unique needs of each child.[6] *See* 20 U.S.C. § 1401

[5] Not only are state educational standards made part of the statutory scheme, a child who attends a school which does not meet state educational standards cannot be counted by a State for federal funding allocation purposes. 34 C.F.R. § 300.750 & comment thereto (1992); *id.* § 300.753(b)(2).

[6] The statutory definition of the IEP contemplates that parents will work with public school officials to develop an IEP. Where

(a)(20). *See also Rowley*, 458 U.S. at 208-09 (quoting S. Rep. No. 168, 94th Cong., 1st Sess. 11-12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435).

The IEP also serves to further the statutory purpose of providing education for children with disabilities in the least restrictive environment. One of the required components of an IEP is a statement of "the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. § 1401(a)(20)(C). Hence, the IEP, by Congress' design, compels consideration of the extent to which the congressional preference for such "mainstreaming" can be fulfilled with respect to each child.[7]

B. The Reimbursement Remedy Upheld by the Court of Appeals is Improper as It Contravenes the Purpose of the Statute

1. *"Appropriate" Relief Under the IDEA, Like That Granted in* Burlington, *Effectuates the State's Statutory Obligation to Provide a Free Appropriate Public Education*

Although the IDEA gives courts the power to grant "appropriate" relief, it does not give them *carte blanche* to fashion remedies under the auspices of the Act without

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the public school officials and the parents have reached an impasse, however, this collaboration will not be possible. Nevertheless, by working with the educators at a private school to develop the type of IEP envisioned in the statute, parents can effectively do what the school district failed to do and thereby advance the purposes of the Act. *Burlington*'s remedial approach is premised upon the idea that unilateral parental action undertaken in the face of impasse can effectuate the State's statutory obligation.

[7] *See Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP must prescribe a pedagogical format in which, 'to the maximum extent appropriate,' a handicapped student is educated 'with children who are not handicapped.'") (quoting U.S.C. § 1412(5)(B); C.F.R. § 300.550(b)(1)), *cert. denied*, 111 S.Ct. 1122 (1991).

regard to the Act's purposes. Instead, relief must be " 'appropriate' in light of the purpose of the Act." *Burlington*, 471 U.S. at 369.[8] As the preceding discussion indicates, that purpose is a detailed and specific one which incorporates a number of congressional policy choices.

As the Court held in *Rowley* in the context of a parental challenge to the sufficiency of an IEP, "the statutory authorization to grant 'such relief as the court determines is appropriate' cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress." 458 U.S. at 206. The propriety of a remedy formulated pursuant to the Act must, therefore, turn on its ability to effectuate *the States'* statutory obligation of providing a FAPE to each disabled child—not on its capacity to advance the private educational agendas of individual parents.

Consistent with this analysis, the Court in *Burlington* premised its view of "appropriate" relief, even in the context of unilateral placements, on the enforcement of the State's statutory obligation. Where parents believe that the school district has failed to carry out its obligation, they may unilaterally undertake to do what the school district *should have done* to fulfill its statutory obligation.[9] If their views are later vindicated—the parent's placement, rather than the school's, was indeed the "appropriate" one under the Act—they may be reimbursed.

Such reimbursement makes the school district pay after the fact for the educational placement which *it should*

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[8] *See also Rowley*, 458 U.S. at 206 (noting in the context of a challenge to an IEP that Congress did not "intend[] that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself").

[9] Because a State's obligation to provide a FAPE must largely be accomplished through the actions of local school districts, the IDEA places obligations on them as well. *See, e.g.*, 20 U.S.C. § 1414.

have funded directly. The *Burlington* remedy thus "merely requires the Town to belatedly pay expenses that it should have paid all along and *would have borne in the first instance* had it developed a proper IEP." *Burlington*, 471 U.S. at 370-71 (emphasis added). Hence, a state or local government is forced to retroactively pay for the same education which a court would have prospectively required it to provide, were the process of judicial review more expedient. *See Burlington*, 471 U.S. at 370 ("If the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient.").

The Court carefully characterized its reimbursement remedy as an unavoidable corollary of such prospective relief, a practical solution necessitated by the "ponderous" realities of litigation.[10] 471 U.S. at 370. The Court recognized that compelling a school district to fulfill its statutory obligation prospectively was not a complete solution, since a great length of time critical to the child's development might elapse before such relief could be ordered. *Id.* Hence, *Burlington* provided for retroactive relief in those instances where parental actions during the interim prior to judicial review serve to effectuate the school district's obligation.

That *Burlington*'s retroactive relief is, in effect, the functional equivalent of prospective relief is evident in the parallel tests the Court articulates for these two types of remedies. Reimbursement for a parental private school

[10] The Court stressed that reimbursement represented the retroactive enforcement of the town's statutory obligation, rather than "damages." *Burlington*, 471 U.S. at 370-71. Thus reimbursement is not, as respondents contend, merely "a remedy for *violation* of [the State's] obligation." Opp. 27-28 (emphasis in original). It is plainly not enough, under *Burlington*, for a parent to demonstrate a school district's default; the parent must also show that his or her own placement effectuated the State's obligation.

placement, *Burlington* holds, is appropriate "if the court ultimately determines that such [parental] placement, rather than a proposed IEP, is proper under the Act." 471 U.S. at 369. Yet the Court arrived at that holding by extrapolating from the same test's applicability to prospective relief:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

471 U.S. at 370.

Under no tenable interpretation would it be "proper under the Act" to require prospectively that a school district place a child in a parentally selected school which does not meet the minimum educational standards of the state educational agency; the same standard of parental selection must also apply where retroactive relief is at issue. The focus of relief, whether prospective or retroactive, is the effectuation of the *State's* statutory obligation.

Of course, even under *Burlington*, the education which a parent unilaterally provides to a child is, at the time of provision, neither "free" nor "public."[11] Yet this does not alter the ability of a parent to effectuate the school district's statutory obligation by undertaking unilaterally to perform the functions assigned to public school officials. A parent cannot force the school district to make the private school placement mandated by the statute,

[11] Since the terms of the FAPE designate public school officials as actors, in some instances a parent may not literally be able to provide a FAPE. *See* Opp. 28; Br. *Am. Cur.* of U.S. on Petition at 15 n.11.

but the parent can, under *Burlington*, make that placement himself. A parent cannot force public school officials to participate in the formulation of an IEP at that private school, but the parent can work with the private educators to fulfill the IEP requirement. A parent cannot force public school officials to supervise the education of the child at a private school, but the parent can perform that monitoring function himself.

In other words, the fact that a parent cannot make a placement "free" or "public" at its inception does not remove the requirement that the parent's placement be "appropriate" within the meaning of the State's statutory oblgation. Reimbursement serves to fulfill the State's obligation retroactively by making what is already an "appropriate" placement both "free" and "public." An inappropriate placement violates the State's obligation; it therefore cannot form the basis for the retroactive enforcement of that obligation through reimbursement.

As the Court observed in *Burlington*, "[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." 471 U.S. at 372. Respondents, in their efforts to obtain a free education, would have this Court read the term "appropriate" out of the statute's prescription. The remedy which they advocate is flatly inconsistent both with the language and purpose of the IDEA, and with this Court's holding in *Burlington*.

2. *The Approach to Reimbursement Advocated by Respondents and the United States Would Undermine the Purpose of the IDEA*

The statutory interpretation articulated by the court of appeals and relied upon by the respondents and the United States evidences a disregard of the limits of judicial relief. This interpretation seeks justification not in the language or purpose of the statute, but in the IDEA's

failure to place limits on a remedy it never even addresses—the reimbursement for unilateral parental placements first recognized by this Court in *Burlington*. Since the statutory obligation placed on the States in the IDEA does not literally refer to or limit post-*Burlington* parental placements, they reason, a court is free to reimburse for such placements even when they deviate from the specifics of the State's statutory obligation. *See* Opp. at 16-18; Br. *Am. Cur.* of U.S. on Petition at 16. Yet in emphasizing what the statute does not say, respondents and the United States all but ignore the ultimate inquiry in assessing federal judicial relief—whether the remedy is consistent with what the statute does say, that is, whether it furthers the evident statutory purposes.[12] This approach disregards the well-established rule that remedial action must be affirmatively grounded in congressional intent and must further the statute's purposes.

Respondents and the United States avoid addressing matters of statutory purpose by retreating to the court of appeals' erroneous application of the *Burlington* test. Under *Burlington*, reimbursement is conditioned on a finding that a parent's "placement, rather than a proposed IEP, is proper under the Act." 471 U.S. at 369. Ignoring *Burlington*'s analysis, as well as the language and purpose of the IDEA, the court of appeals held that a parental placement need not conform to the terms of the IDEA in order to be "proper under the Act," as long as

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[12] Although the United States' discussion of appropriate remedies correctly indicates that furtherance of the statute's purposes is essential, *see* Br. *Am. Cur.* of U.S. on Petition at 12, the United States fails to meaningfully address the effect that reimbursing Shannon's placement would have on the statutory goal of providing a FAPE. Respondents merely repeat the court of appeals' assertion that "[c]onditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further" without providing any analysis as to what "values and policies" would be furthered by reimbursing for a placement which fails to provide two essential elements of a FAPE. *See* Opp. 18 (quoting Pet. App. 17a).

it is "reasonably calculated to enable the child to receive educational benefits."[13] Pet. App. 16a-17a. Adopting the court of appeals' definition of the phrase "proper under the Act," respondents and the United States assert that Shannon's placement was an "appropriate" one since she was found to have made academic progress. *See* Opp. at 14-15; Br. *Am. Cur.* of U.S. on Petition at 16-17.

Yet by modifying the word "proper" with the phrase "under the Act," the *Burlington* Court clearly intended for the propriety of a parental placement to be ascertained by reference to the obligation set forth in the Act, not by reference to a judge's own views. *Cf. Rowley*, 458 U.S. at 206. The statute does not set forth any standards for parental placements; the words "under the Act" must therefore refer to the State's statutory obligation or be completely meaningless. Moreover, the *Burlington* Court also used the words "proper under the Act" to refer to school district placements, 471 U.S. at 369, and to the type of proposed parental placement that could give rise to *prospective* relief. 471 U.S. at 370.[14] This indicates that the Court had but one standard of propriety in mind—the one set forth in the statute.

Ignoring these indications, respondents and the United States would cut *Burlington*'s reimbursement test loose from its statutory and analytic moorings to justify a result at odds with the intent of Congress and the holdings of this Court: reimbursement for Shannon Carter's placement at Trident, a school which the court of appeals

[13] This verbal formulation is taken from the *Rowley* opinion. 458 U.S. at 206-07. Yet the language which the court of appeals borrowed constitutes only one part of *Rowley's* analysis regarding the appropriateness of a placement—the *Rowley* Court also viewed satisfaction of the "items on the definitional checklist" of a FAPE as mandatory. 458 U.S. at 189; *see id.* at 206 & n.27. Taking this language out of the context in which it was used in *Rowley*, the court of appeals created an erroneous standard.

[14] Indeed, the Court's analogy to prospective relief is a critical part of its analysis. *See* pp. 12-13, *supra*.

found "does not attempt to comply with the terms of the Act." *See* Pet. App. 11a. A school's inability to satisfy any one element of the statute's requirements would be sufficient to preclude reimbursement; Trident's two failings represent separate and independent grounds for reversal of the court of appeals' decision.

(a) *Trident Failed to Meet the Standards of the State Educational Agency*

The court of appeals found that at least two Trident teachers, one of whom taught Shannon, were not certified as required by state educational standards. Pet. App. 11a-12a. By upholding reimbursement of Shannon's placement despite this failing, the court of appeals contravened express statutory language that makes those standards an elemental part of the educational opportunity Congress wished to guarantee children with disabilities. *See, e.g.*, 20 U.S.C. § 1401(a)(18)(B).

In justifying this outcome, respondent and the United States assert that parents cannot be expected to "assess compliance with [South Carolina's] voluminous standards." Opp. 24; *see* Br. *Am. Cur.* of U.S. on Petition at 14-15. If such requirements were imposed on parents, the United States argues, "the parents' right to obtain a free, appropriate education for their child would be held hostage to the state or local agency's willingness to cooperate in the parents' efforts to find an alternative placement for their child." Br. *Am. Cur.* of U.S. on Petition at 14-15.

Yet the ability of parents to place their children in schools which comply with the statutory criteria is not dependent on any act of state or local approval. The statute simply requires that the education provided to a child with a disability "meet the standards of the State educational agency." 20 U.S.C. § 1401(a)(18)(B). While some States have compiled lists of "approved"

schools which meet their educational standards,[15] it is the objective meeting of educational standards rather than any specific act of approval which is crucial under the statute. Compliance with the objective standards promulgated by the State educational agency is the definitive criterion, not a state or local agency's advance approval of a particular school or placement.

Nor do parents need to rely on assistance from state or local educational agencies to determine whether a particular private school meets educational standards. Because private schools have a financial incentive to attract students, schools which meet the state educational standards will doubtless make their compliance known to interested parents.[16]

Equally important, in focusing on the convenience of parents in making placements, respondents lose sight of the fundamental nature and purpose of the *Burlington* remedy. The *Burlington* Court did not pretend to offer parents an easy or risk-free option to be undertaken lightly. Because a parent, in making a unilateral placement, is stepping into the unfamiliar realm of educational judgment calls, the Court recognized that the path to reimbursement is necessarily fraught with financial risk and uncertainty. *See Burlington*, 471 U.S. at 373-74. *Burlington* did, however, offer parents willing to take that risk the possibility of reimbursement should a court later find that they had, in effect, done the job that the school district should have done.

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[15] New York is one such State. *See Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

[16] Moreover, if compliance with state educational standards is recognized as a requirement for reimbursement, there will be increased parental demand for private schools that comply, inducing more private schools to meet those standards.

(b) *Shannon's Education Was Not Provided in Conformity With an IEP*

Respondents and the United States, like the court of appeals, maintain that Shannon's education was "proper under the Act" even though it lacked an IEP, which this Court has identified as "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. at 311. Intimating that Trident's shortcoming in this regard was one of form rather than substance, the court of appeals explained that "Trident does not . . . develop education plans called IEPs, though it does set goals for students and revise them four times per school year." Pet. App. 11a. This ignores the fact that IEPs formulated pursuant to Congress' specifications serve a number of purposes, some of which are not directly related to academic goal-setting.

Specifically, the IEPs which Congress made a central element of a FAPE serve both to engage parents in the educational process and to provide a vehicle through which Congress' preference for education in the least restrictive environment can be fulfilled.[17] Hence, the court of appeals erred in assuming that Trident's system of goal setting was sufficient to provide the type of "appropriate" education that Congress had in mind.

(c) *The Trident Placement Was Not an "Appropriate" Placement Under the Act*

Only by substituting its own view of an "appropriate" education for that detailed by Congress in the IDEA could the court of appeals have concluded that the educa-

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[17] Dr. Richard Ferrante, who conducted the state educational agency's review of the Carters' due process hearing, expressed the opinion that the Trident placement itself violated the principle of least restrictive environment: "Clearly, the concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting." Pet. App. 42a.

tion Shannon received at Trident was reimbursable under *Burlington*. Shannon's placement at Trident contravened two separate elements which Congress found essential to its statutory goal of providing a "free appropriate public education" to all children with disabilities. The court of appeals' decision that the education Shannon received at Trident was nonetheless "proper under the Act" appears to have been driven solely by the court's own after-the-fact assessment that Shannon made sufficient academic progress.

Yet academic progress is but one aspect of the appropriate education Congress sought to guarantee through the IDEA. Congress also sought to ensure that disabled children would be educated in accordance with the same quality standards as other public school students, that they would receive individualized programs of instruction, that their parents would participate in the educational process, and that they would be, to the extent feasible, educated with nonhandicapped children. *See, e.g.*, 20 U.S.C. §§ 1401(a)(18) and 1412; *Roland M.*, 910 F.2d at 992 ("purely academic progress—maximizing academic potential—is not the only indicia of educational benefit implicated . . . by the Act"). The court of appeals' determination that Shannon's education was "appropriate" based on its own judgments concerning academic progress can only serve to undermine those other statutory purposes, a result Congress clearly did not intend.

If a unilateral parental placement need only live up to a federal judge's view of academic adequacy in order to be reimbursable, parents and private schools will no longer strive to effectuate Congress' multifaceted vision of an "appropriate" education. By sanctioning reimbursement without regard to the nonacademic aspects of the statutory mandate, the court of appeals' judgment virtually ensures that fewer children with disabilities will receive the type of education which Congress expressly

sought to provide them through the IDEA. Because this remedy works at cross purposes with congressional intent, it cannot constitute "appropriate" relief under the Act and the judgment below should be reversed.

II. THE COURT OF APPEALS' REIMBURSEMENT REMEDY IMPERMISSIBLY ENCROACHES ON STATE AND LOCAL AUTHORITY OVER THE EDUCATION OF CHILDREN WITH DISABILITIES

A. The Court of Appeals' Remedy Erodes the States' Role in Setting Educational Standards in a Manner Never Contemplated By Congress

This Court has repeatedly emphasized that education is "primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). *See also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); *Wood v. Strickland*, 420 U.S. 308, 326 (1975). Judicial deference to state and local decision-making in the field of education is essential, since "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Rowley*, 458 U.S. at 208 (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973)).[18]

Congress, in passing the IDEA, did not shift responsibility for setting educational standards from the States to the federal courts. On the contrary, Congress expressly preserved the role of the state educational agency in setting standards by incorporating those standards into the statutory mandate. Hence, "Congress' intention was

[18] *See also Roland M.*, 910 F.2d at 992 ("[a]cademic standards are matters peculiarly within the expertise of the [state] department [of education] and of local educational authorities") (citation omitted).

not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208.[19]

State standards for teacher certification, which are at issue in this case, represent a particularly important component of States' efforts to improve the quality of education.[20] *See, e.g.*, National Governors' Association, *Time for Results: The Governors' 1991 Report on Education* 32-33 (1986) (for States seeking to improve teacher quality, "[t]he guiding theme has been raising standards at all stages of the teaching career, but especially at training and initial certification"). It is critical that state policymakers develop standards necessary to ensure teacher quality rather than leaving such matters to the judgment of parents, since "[t]he disturbing fact is that parents and citizens may not be able to readily detect important differences between professional levels of teaching and below-par performance." *Id.* at 32 (citation omitted).[21]

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[19] *See also Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 785 (1st Cir. 1984) (In the IDEA, "Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states."), *aff'd*, 471 U.S. 359 (1985).

[20] Courts have recognized the importance of state teacher certification standards to the quality of education. *See, e.g. Sheridan Road Baptist Church v. Dept. of Educ.*, 396 N.W.2d 373, 381 (Mich. 1986) (teacher certification is a compelling state interest), *cert. denied*, 481 U.S. 1050 (1987).

[21] Where education of children with disabilities is involved, the need for qualified teachers is especially pressing. *See* Virginia Board of Education, *A Study of the Preparation of Special Education Instructional And Administrative Personnel, Class Size Requirements and the Funding of Special Education Programs*, Va. S. Doc. No. 13 at 21 (1990) ("Consumers and school division personnel alike warn that the greatest barrier to program quality continues to be the need for qualified teachers of handicapped students.").

In short, state educational standards, such as those governing teacher certification, provide a measure of quality control in special education programs.[22] Congress specifically incorporated those standards into the statutory definition of a FAPE, and specified that those standards would govern without regard to whether the child's FAPE was provided in a public or private school. *See* 20 U.S.C. § 1413(a)(4)(B). This ensures that children with disabilities, whether educated in a public or private school setting, receive an education meeting the same standards of quality as the education provided to other public school students.

Reimbursing for placements which do not meet the quality standards Congress expressly extended to children with disabilities will inevitably erode those standards and the level of educational quality they were calculated to protect. Because this result is at odds with the purposes of the Act, it cannot be undertaken in the name of "appropriate" relief.

B. States Did Not Agree to Relinquish Control Over Educational Standards As a Condition of Receiving Federal Funding Pursuant to the Act

This Court has repeatedly held that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Rowley*, 458 U.S. at 204 n.26 (quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). So that States may enter into such contracts "knowingly, cognizant of the consequences of their participation," this Court has instructed that "if Congress intends to impose a con-

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[22] *See* Arthur E. Wise *et al.*, *Licensing Teachers: Design for a Teaching Profession* v (1987) ("The primary rationale [for professionalization of teaching] is a need for quality control over a process in which a service is provided to a client who inevitably knows less than the provider.").

dition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17; *see Rowley*, 458 U.S. at 204 n.26.

Under the IDEA, provision of federal funds is conditioned upon the States' obligation to provide a FAPE to children with disabilities.[23] The detailed definition of a FAPE defines the scope of that obligation, and the States are put on notice that relief may be granted which is appropriate to the enforcement of that obligation.[24] Nothing in the statutory language gives States even the vaguest hint that by accepting federal funds, they have ceded the right to set controlling standards for the educational programs which they, in large part, pay for.[25] On the contrary, the IDEA assures States that compliance

[23] The question of whether the Act is premised on the Spending Clause or on the Fourteenth Amendment does not appear to have been definitively decided by the Court. In *Dellmuth v. Muth*, 491 U.S. 223, 227 n.1 (1989), the question was not reached by the Court since the petitioner there conceded that the Act was promulgated pursuant to the Fourteenth Amendment. However, the Court's earlier decision in *Rowley* strongly indicates that the Act is based on Congress' spending power. *See* 458 U.S. at 204 n.26. The fact that the IDEA is couched in terms of conditional federal funding makes it unlikely that Congress was acting pursuant to the Fourteenth Amendment. As in *Pennhurst*, "[s]urely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States." 451 U.S. at 18. Moreover, this Court admonished in *Pennhurst* that "[w]e should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 451 U.S. at 16.

[24] Hence, the relief granted in *Burlington*, which involved the retroactive enforcement of the State's statutory obligation, was a foreseeable part of the State's "contract" with the federal government.

[25] At present, only about 7% of special education costs are federally funded, compared to the promised funding level of 40%. *See* Br. *Am. Cur.* of National School Boards Association (NSBA) on Petition at 4.

with their own standards is an integral part of the statutory scheme. *See* 20 U.S.C. §§ 1401(a)(18) and 1412(6).

In *Rowley*, the Court rejected an open-ended, unlimited interpretation of the Act's requirement of an "appropriate education" based, in part, on a *Pennhurst* analysis. 458 U.S. at 204 n.26. Since the statutory language and legislative history revealed that Congress had not "imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts," *id.* at 190 n.11, it certainly had not done so "unambiguously, as required in the valid exercise of its spending power." *Id.* at 204 n.26 (citing *Pennhurst*, 451 U.S. at 17). *Rowley*'s analysis compels the same conclusion here. States were given no notice that acceptance of federal funds under the IDEA would erode their authority to set standards for special education programs, making their financial exposure for such programs dependent upon the case-by-case educational judgments of federal courts. Because the court of appeals' remedy amounts to the imposition of a new, unexpressed condition of federal funding, its judgment should be reversed.

C. The Court of Appeals' Reimbursement Remedy Hinders the Ability of State and Local Governments to Devote Their Limited Resources to High Quality, Cost-Effective Educational Services

The cost of educating children with disabilities has grown rapidly in recent years, placing an ever-increasing burden on strapped state and local governments.[26] During

[26] *See, e.g.*, Br. *Am. Cur.* of NSBA on Petition at 4-5 and sources cited therein (discussing rising cost of special education nationwide); Pet. 20 n.12 (discussing financial crisis with which school districts are faced). The vast majority of these rising costs must come from state and local governments, since the federal government has never contributed more than a small fraction of the special education assistance it promised to provide. *See* note 25, *supra*.

the 1989-90 academic year, over 4.6 million children (11.44% of the total enrollment) were educated pursuant to federally funded special education programs such as the IDEA. National Center for Education Statistics, *Digest of Education Statistics* 64 (1992) (Table 50). To meet the needs of children with disabilities within the constraints of their limited resources, state and local governments have recognized the need to make special education more cost-effective.[27]

Quality control and cost-effectiveness are of particular concern where private placements are involved, since neither the State nor the local school district is directly providing services. Standards set by the state educational agency provide a measure of quality control in substantive educational matters where a private school placement is involved; they can also serve other purposes, such as making educational programs safe for the children enrolled in them, or making them financially accountable to the public entities which must pay for them.

Where the school district itself makes the private placement, there are other checks as well. The public school

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[27] *See, e.g.*, Maryland Dept. of Fiscal Services, *Special Education: A Review of Programs and Funding in Maryland* 37 (1983) ("Policymakers and practioners alike now realize that fiscal retrenchment demands an active search for more effective ways to do more with less."). *See also* Jane Knitzer *et al.*, *At the Schoolhouse Door: An Examination of Programs and Policies for Children with Behavioral and Emotional Problems* 119 (1990) (suggesting that States "take steps to undo dysfunctional patterns of fiscal incentives towards high cost placements for children with behavioral and emotional disorders").

Efforts to make special education more cost-effective are reflective of the States' present approach to the provision of all services. *See* National Governors' Association & National Association of State Budget Officers, *The Fiscal Survey of States* 31 (April 1993). "Major reform already is underway in many states to ensure that limited resources are spent on efficient and effective programs that address critical priorities." *Id.*

officials are involved in the selection of the school and the formulation of the IEP; they also perform a supervisory role with respect to the child's education. *See, e.g.*, 20 U.S.C. § 1412(6). In contrast, where parents make the placement, standards set by the state educational agency constitute the *only* measure of quality control over the private programs on which public funds are spent. The court of appeals' decision would remove this control, and, with it, the ability of States and local school districts to ensure that the programs they fund are high quality, cost-effective and accountable.

State and local governments have an obligation to expend money from the public fisc in a responsible, accountable, cost-effective manner, and they are entitled to set educational standards which will enable them to fulfill that obligation. *See In re Conklin*, 946 F.2d 306, 311 n.5 (4th Cir. 1991) ("A state properly has a legal right to impose certain requirements and conditions on a special education facility before the state can be forced to pay for the education of a handicapped child there."). If state and local governments are stripped of this measure of control over the private special education programs which they must fund under the *Burlington* doctrine, their capacity to ensure that money is spent appropriately will be compromised as public money is diverted to uses over which they have no control.

Moreover, since educational standards reflect expert judgments as to the best methods of providing education, they channel state and local funds to their most cost-effective uses. When those standards are disregarded in ordering reimbursement, public money flows to schools which may use less cost-effective educational practices. For example, States have made the judgment that teachers certified in accordance with state standards are more likely to provide a high quality education; hence, paying the salary of a certified teacher is viewed as a more cost-effective use of public money than paying the salary of

an uncertified teacher. Ordering reimbursement to a school which employs uncertified teachers may, therefore, force public school districts to make payments which do not produce corresponding levels of educational benefit.

Such costly and inefficient reimbursements can deplete public funds in a manner vastly disproportionate to the expenditures made on behalf of other students,[28] leaving less money to be put to the uses which the state educational agency deems more effective. Moreover, allowing such reimbursements gives private schools little incentive to achieve the quality standards set by the State.

If reimbursements such as the one at issue here are permitted, the private schools which fail to provide an appropriate education to children with disabilities, and parents such as the Carters who choose to place their children there, will reap a windfall at the expense of other taxpayers, citizens, and children. Meanwhile, disabled children placed in such schools will not receive the one thing Congress intended to guarantee them—a "free appropriate public education."

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[28] The educational programs for which parents seek reimbursement under the IDEA can be very expensive indeed. *See, e.g., Drew P. v. Clarke County School District*, 877 F.2d 927 (11th Cir. 1989) (partial reimbursement ordered for placement in Tokyo), *cert. denied*, 494 U.S. 1046 (1990); *Matta v. Bd. of Educ.*, 731 F. Supp. 253, 259 (S.D. Ohio 1990) (in denying reimbursement claim for placement in Japan, noting that "funding for one student in such a program could act to the detriment of many other students, both handicapped and nonhandicapped").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 29, 1993